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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/018,492	03/06/2002	Gudrun Schmidt	112843-036	8620

29157 7590 12/17/2004
BELL, BOYD & LLOYD LLC
P. O. BOX 1135
CHICAGO, IL 60690-1135

EXAMINER

MARX, IRENE

ART UNIT	PAPER NUMBER
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1651

DATE MAILED: 12/17/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action Before the Filing of an Appeal Brief	Application No.	Applicant(s)	
	10/018,492	SCHMIDT ET AL.	
	Examiner	Art Unit	
	Irene Marx	1651	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 15 November 2004 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
- Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The reply was filed after the date of filing a Notice of Appeal, but prior to the date of filing an appeal brief. The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☒ They raise the issue of new matter (see NOTE below);
- (c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
- The status of the claim(s) is (or will be) as follows:
- Claim(s) allowed: _____.
- Claim(s) objected to: _____.
- Claim(s) rejected: 1, 3, 5 and 6.
- Claim(s) withdrawn from consideration: 4 and 7-15.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attachment.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____
13. ☐ Other: _____.

Irene Marx
Primary Examiner
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Note:

The proposed amendment raises new issues that would require further consideration and/or search with respect to the broadening of claim 3 to an independent claim, recitation of “exposing” and the replacement of “about” with “at least”, including new issues under 35 U.S.C § 112 and of new matter. New issues that would require further consideration and/or search are also raised by the proposed deletion of “a sublethal level of stress” and the addition of “at least” in claim 1.

Response to Arguments

Applicant's arguments have been fully considered but they are not deemed to be persuasive.

Applicant's arguments are directed to claims that are not entered.

Applicant argues that the method of Carrie does not allow for an adaptive process of at least 15 minutes. However, the claims as written fail to require this limitation regarding temperature alone. Moreover, Broadbent *et al.* disclose that *Lactobacillus* strains are protected against stress by subjecting the strains to sublethal levels of heat shock at various temperatures (See, e.g., Table 1, page 14). The reference strongly suggests that induction of heat shock proteins results in thermotolerance in various *Lactobacillus* (See, e.g., page 18, paragraph 3). Therefore, one of ordinary skill in the art would also have reasonably expected this effect in protecting *L. johnsonii* La1 against stress

In addition, Kilstrup *et al.* teach the protection of the bacteria against stress by induction of heat shock proteins in *Lactococcus* using sublethal levels of salt stress (See, e.g., page 1834) and Volker *et al.* similarly teach the induction of heat shock proteins in *Bacillus* using sublethal levels of heat and/or salt stress to protect the microorganisms against stress due to induction of stress tolerance in the strains (See, e.g., page 2128).

Applicant argues that although heat shock response is universal, each individual species requires different lethal challenge temperatures, as suggested by Broadbent *et al.*. Applicant also argues that Kilstrup suggests that different salt concentrations are used to stress different species of bacteria. Applicant concludes that the references would not have taught how to arrive at the specific method of protecting *L. johnsonii* as recited in the claimed invention based on the applied art. However, claims 1 and 3 of record are not directed to the touted invention.

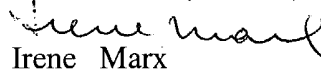
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Therefore the rejection is deemed proper and it is adhered to.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Irene Marx whose telephone number is (571) 272-0919. The examiner can normally be reached on M-F (6:30-3:00).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael G. Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300 .

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Irene Marx
Primary Examiner
Art Unit 1651